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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 125

GEORGE BROOKS, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, EX REL. DAVID BAYARSKY

REPLY MEMORANDUM FOR PETITIONERS

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The Congress of the United States in the exercise of the power granted to it by the Constitution,[1] has in Public Law 213 defined and limited the jurisdiction of the district court, and in the plainest language provided in Clause (C) that no district court should have jurisdiction to proceed with any pending suit whenever it shall be made to appear that it was based upon evidence or information in the possession of the Government "at the time such suit was brought." Admittedly this suit is based upon evidence and information which was in the possession of the Government at the time it was brought. Clause (D) is not inconsistent. It provides for a stay in pending suits, for

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[1] Art. I, sec. 3.

notice to the Attorney General, and allows sixty days within which he may appear and carry on the suit in accordance with Clause (C). The Attorney General is thus authorized to appear and carry on a pending suit until it appears that the suit was based upon evidence or information in the possession of the Government "at the time such suit was brought." This is a matter of proof. When that is made to appear, Clause (C) provides "The Court shall have no jurisdiction to proceed." Thus the proper function of Clause (D) is to authorize the Attorney General to carry on a pending suit over which the court has jurisdiction as defined in Clause (C).

The question presented is one of jurisdiction, not merits. Before any court may pass upon the alleged merits of a controversy, it must have jurisdiction. If it does not have jurisdiction, the merits are immaterial. The Congress of the United States determines the jurisdiction of the district court, and its determination is, or at least should be, conclusive alike upon the Government as upon the humblest of its citizens.

The important question which inheres in this situation is one of usurpation by the judiciary under the guise of judicial construction of the constitutional power and authority of the Congress to define and limit the jurisdiction of the District Court. Particularly is it important for this Court to look into the question of jurisdiction when it appears that three district courts [2] examining the question independently concluded that the plain language of the statute forbade the exercise of further jurisdiction.

At the urging of the Government the Fifth Circuit [3] reversed the District Court based upon an alleged con-

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[2] *Sherr* v. *Anaconda Wire and Cable Co.*, Southern District of New York, 57 Fed. Supp. 106; *U. S.* v. *Brooks* (N. J.), 58 Fed. Supp. 714; *U. S.* v. *Pittman*, Northern District of Alabama, no opinion reported.

[3] *U. S.* v. *Pittman*, 151 F. (2d) 851.

struction of the statute which we have shown in Point IV of our brief [4] is palpably erroneous and is contrary to the meaning of the plain words of the Congress as indicated by the Conference Report. Following this decision, the Third Circuit reversed in this case.[5]

This Court denied a writ of certiorari in *U. S.* v. *Pittman*,[6] but we believe that upon examination it will be found that the reasons advanced in support of the application here are essentially different from those unsuccessfully urged there.

Conclusion

The question of jurisdiction should be settled by this Court and for that purpose the petition herein should be granted.

July 10th, 1946.

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[4] P. 27.

[5] Opinion not reported, but printed here at page 11 of the Record.

[6] May 13, 1946, No. 1035, October Term, 1945.